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JOSEPH F. SPANGL, JR.  
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No. 88-

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

COUNTY LINE JOINT VENTURE,

*Petitioner,*

v.

CITY OF GRAND PRAIRIE, TEXAS,

*Respondent.*

*On Petition For Certiorari To The United States  
Court Of Appeals For The Fifth Circuit*

**PETITION FOR CERTIORARI**

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July 18, 1988



## QUESTIONS PRESENTED

1. Is a property owner entitled to procedural due process — notice and a hearing — prior to termination of the owner's specific use permit?
2. Is a property owner entitled to a reasonable post-deprivation hearing following termination of the owner's specific use permit if the termination occurred without notice to the property owner or opportunity for a hearing?



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**PETITION FOR CERTIORARI**

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**OPINIONS BELOW**

This petition seeks review of a decision of the United States Court of Appeals for the Fifth Circuit which is reported at 839 F.2d 1042 and reprinted as Appendix D (13a).<sup>1</sup> The Order of the United States District Court for the Northern District of Texas, Dallas Division (Porter, J.), denying Petitioner's Motion for Partial Summary Judgment and granting Respondent's Motion

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<sup>1</sup> References to the appendices will be styled, e.g., "App. A"; to particular pages therein, "10a"; to portions of the district court record, "R., Vol. I at 10". The appendices are bound in a separate volume.

for Summary Judgment is reprinted as App. C (6a). The initial Order of the United States District Court for the Northern District of Texas, Dallas Division (Buchmeyer, J. sitting for Porter, J.), granting Petitioner's Motion for Partial Summary Judgment is reprinted as App. A (1a). The Order of the Fifth Circuit denying Petitioner's Request for Rehearing and Suggestion for Rehearing *en banc* is reprinted as App. E (24a).

## JURISDICTION

The decision and judgment of the Court of Appeals was entered on March 18, 1988. A timely Petition for Rehearing and Suggestion for Rehearing *en banc* was denied on April 19, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

### A. Constitutional Provisions.

The Fifth Amendment:

"No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment:

" . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . . ."

### B. Ordinances.

City of Grand Prairie Ordinance No. 2750<sup>2</sup>

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<sup>2</sup> The full text of Ordinance No. 2750 is set out in App. F (26a).



"An ordinance . . . amended so as to establish a specific use permit . . . for the purpose of on site use of alcoholic beverages . . ."

City of Grand Prairie Ordinance No. 3745<sup>3</sup>

"An ordinance . . . related to termination of specific use permits, . . .

- A. All specific use permits approved in accordance with with the provisions of this ordinance in its original form or as hereafter amended shall automatically terminate upon cessation of the use for a period of six months, regardless of the intention of the owner.

. . . "

### STATEMENT OF THE CASE

This case involves an ordinance that automatically terminates property rights regardless of the intention of the owner but provides no provision for notice and hearing prior to the termination and no post-deprivation procedure to allow a review of the termination.

Petitioner, County Line Joint Venture,<sup>4</sup> filed suit against Respondent, City of Grand Prairie, Texas,<sup>5</sup> seeking to have Ordinance No. 3745 declared unconstitutional because, *inter alia*, it, in conjunction with the Respondent's lack of a proper procedural

<sup>3</sup> The full text of Ordinance No. 3745 is set out in App. G (32a).

<sup>4</sup> County Line Joint Venture, Plaintiff and Appellant below, will hereinafter simply be referred to as "Petitioner."

<sup>5</sup> City of Grand Prairie, Texas, Defendant and Appellee below, will hereinafter simply be referred to as "Respondent."

mechanism, denies property owners due process of law.<sup>6</sup> Petitioner moved the district court for a motion for partial summary judgment. (R., Vol. I at 32-86). Respondent moved the district court for a summary judgment. (R., Vol. I at 153 through Vol. II at 330). The district court initially granted Petitioner's motion for partial summary judgment on November 20, 1986 (1a).

The initial district court order granting Petitioner's motion for partial summary judgment on the due process issue found that "[n]either Plaintiff nor his lessee was given a hearing with respect to the termination of the specific use permit", (1a), and that "Plaintiff's use of his land to sell alcoholic beverages for on-premises consumption is a significant property interest, protected by the due process clause of the United States Constitution." (2a). The district court then concluded that "Defendant deprived Plaintiff of his property without due process of law" (2a).

On November 21, 1986, the district court vacated its summary judgment in favor of Petitioner "because it was prematurely entered" (5a). Thereafter, the Respondent filed its motion and brief for summary judgment. (R., Vol. I at 153 through Vol. II at 330).<sup>7</sup> On March 18, 1987, Judge Porter entered an order denying Petitioner's motion for partial summary judgment and granting Respondent's motion for summary judgment and dismissing the

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<sup>6</sup> Petitioner raised numerous grounds for challenging the constitutionality and legality of Ordinance No. 3745 and the Respondent's actions against Petitioner. The Fifth Circuit remanded the case for further consideration of the other federal claims and state claims, but affirmed the district court's grant of summary judgment for the Respondent on the procedural due process issue (23a).

<sup>7</sup> Respondent's motion and brief in support of Respondent's motion for summary judgment and response to Petitioner's motion for partial summary judgment did not raise any contest to the undisputed facts that Petitioner was not given notice or a hearing prior to the termination and that Petitioner's specific use permit was a significant property interest protectable by the due process clause of the United States Constitution.

remainder of the claims (6a). The district court's order made a glaring factual omission and misconception. The district court failed to understand that Petitioner had a perpetual *pre-existing* specific use permit and that the permit had been terminated. The district court erroneously determined in its opinion and order that Petitioner was applying for a new specific use permit and that the Respondent's actions were a denial of an application as opposed to a termination of an existing property right. The district court dismissed Petitioner's remaining federal claims and pendent state claims (12a). Petitioner timely appealed Judge Porter's order of March 18, 1987.

On March 18, 1988, a panel of the Fifth Circuit Court of Appeals affirmed the district court's grant of a summary judgment for Respondent on the procedural due process issue and remanded the case for further consideration of the other federal claims and state claims pending (23a). The appellate court viewed the Respondent's termination of Petitioner's property interest as a legislative act and, thus, determined that Petitioner had no due process rights (16a — 17a, 20a).

Petitioner is the owner of property located at 2515-H W. Jefferson in Grand Prairie, Texas. The property has been used for a number of years as a night club. (R., Vol. I at 139). On August 31, 1976, Respondent granted Petitioner a specific use permit enabling the sale of alcoholic beverages at the property. On November 27, 1985, Petitioner's tenant applied to Respondent for (i) an alcoholic beverage license; (ii) a dance hall license; and, (iii) a mechanical amusement device license. (R., Vol. I at 140). On December 2, 1985, Respondent, by and through the City Secretary, denied all three applications. (R., Vol. I at 141). The Secretary denied the applications because she determined that Petitioner's specific use permit had terminated.<sup>8</sup>

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<sup>8</sup> See, n. 16 through 18, *infra*.

Prior to December 2, 1985, Petitioner had not been notified that Respondent had determined to terminate Petitioner's specific use permit. Petitioner was not given notice or a hearing prior to the termination of its property right.

Subsequent to Respondent's termination of the specific use permit, Petitioner attempted to appeal the City Secretary's decision administratively. (R., Vol. I at 142).<sup>9</sup> Respondent refused to hear Petitioner's appeal. (R., Vol. I at 143) (46a). Apparently, Respondent does not have a procedural mechanism to appeal the City Secretary's determination that a property owner's specific use permit is terminated.

Respondent admitted in the district court and Court of Appeals that (i) Petitioner's specific use permit is a significant property interest, (ii) that Petitioner received no notice and no hearing prior to the termination of the specific use permit, and (iii) that Respondent refused to hear Petitioner's appeal. Petitioner seeks review of the Court of Appeals' decision affirming the district court's dismissal of Petitioner's procedural due process rights. The Fifth Circuit found that the Respondent's actions were legislative rather than adjudicative in nature and refused to afford Petitioner its procedural due process rights. Petitioner believes that the case-specific decision of the city secretary should not be afforded legislative deference and that Petitioner has procedural due process rights which have been violated.

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<sup>9</sup> The full text of Petitioner's administrative appeal is contained in App. H (35a).

## REASONS FOR GRANTING THE WRIT

### I. SIGNIFICANT CONFLICT OF DECISIONS AMONG THE CIRCUITS.

The Fifth Circuit's decision denying procedural due process rights to Petitioner and affirming the decision of Respondent's city secretary terminating Petitioner's specific use permit directly conflicts with a decision of the Ninth Circuit Court of Appeals. In *Kerley Industries, Inc. v. Pima County*, 785 F.2d 1444 (9th Cir. 1986), the Ninth Circuit found that Kerley's conditional operating permit could not be revoked without giving Kerley a hearing and opportunity to prove the zoning inspector wrong. Kerley had obtained a conditional operating permit that would enable it to manufacture a specific chemical.<sup>10</sup> The court, relying upon this Court's decision in *Board of Regents v. Roth*, 408 U.S. 564 (1972), determined that the conditional operating permit<sup>11</sup> was a significant property right triggering the constitutional requirement of due process. The Court said:

Having granted appellant a permit to operate its plant, the County could not take it away arbitrarily, *Wheeler v. City of Pleasant Grove*, 664 F.2d 99 (5th Cir. 1981), *cert. denied*, 456 U.S. 973, . . . (1982), for improper reasons, or without appropriate procedural safeguards. *Roth*, 408 U.S. . . .

785 F.2d at 1446.

It is undisputed in this case that the City granted Petitioner a perpetual specific use permit in August, 1976<sup>12</sup> and that the property had been used for the sale of alcoholic beverages for

<sup>10</sup> Kerley's plant never manufactured the chemical.

<sup>11</sup> Unlike the specific use permit in the case at bar, the conditional permit was only for 30 days. Petitioner's specific use permit had been in effect for over ten years prior to its wrongful termination and was perpetual.

<sup>12</sup> Ord. No. 2750 (App. F at 26a).

many years.<sup>13</sup> Because Petitioner's property right is perpetual and not "conditional," there is even more reason to find that it is a significant property right which endows Petitioner with a sufficient claim of entitlement to trigger the constitutional requirement of due process. The Fifth Circuit failed to address the property interest involved. Instead, the Court erroneously concluded that Respondent's actions should be viewed as legislative in nature and, thus, Petitioner had no procedural due process rights. By concluding that the conduct of Respondent and its secretary were legislative acts, the Fifth Circuit disposed of Petitioner's constitutional rights with haste.

## II. SIGNIFICANT PROPERTY INTERESTS ARE ENTITLED TO PROCEDURAL DUE PROCESS PROTECTION.

This Court has stated that:

The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of *prior* hearing is paramount.

*Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 570-71 (1972) (emphasis added).<sup>14</sup> Petitioner has a legitimate claim of entitlement and expectation that its specific use permit will not be terminated unless Petitioner is afforded procedural due process.

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<sup>13</sup> (R., Vol. I at 139).

<sup>14</sup> In the *Roth* decision, this Court elaborated on the requirements of procedural due process by stating that "It is fundamental that except in emergency situations . . . due process requires that when a State seeks to terminate [a protected] interest . . . , it must afford 'notice and opportunity for hearing appropriate to the nature of the case' *before* the termination becomes effective." *Roth*, at 408 U.S. at 571 n.7 (quoting *Bell v. Burson*, 402 U.S. 535, 542 (1971)).

The specific property right in question was granted, by ordinance, to Petitioner in August, 1976.<sup>15</sup> Petitioner has used the property consistent with the grant of the specific use permit since 1976 and up until the termination of the specific use permit in December, 1985. Petitioner has never abandoned the specific use permit nor has Petitioner ever used the property inconsistent with the specific use permit. In fact, even prior to the specific ordinance giving Petitioner a specific use permit, Petitioner had used the property for the same purposes, i.e., the sale of alcoholic beverages.

Federal courts have recognized that property rights, giving the property owners a legitimate claim of entitlement to due process protection, have arisen in many circumstances. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, \_\_\_\_\_ U.S. \_\_\_\_\_, 107 S. Ct. 2378 (1987) (ordinance temporarily denying landowner all the use of his land may be considered a taking of property); *McCulloch v. Glasgow*, 620 F.2d 47, 50 (5th Cir. 1980) (conflict between plaintiffs' arguable unencumbered title and town's arguable easement sufficient to create a significant property interest entitling plaintiffs to due process hearing); *Richland Park Homeowners Ass'n, Inc. v. Pierce*, 671 F.2d 935, 944 n.7 (5th Cir. 1982) (any diminution in the owner's rights of use in his property will fall within the purview of the due process clause); and, *Evers v. County of Custer*, 745 F.2d 1196, 1201-1202 (9th Cir. 1984) (total taking of property not necessarily required — deprivation of property interest may occur when a property owner's right to exclude others is prevented).

The right to use one's property in the same manner that the property has been used for in excess of 25 years is, without doubt, a significant property interest. The significance of the property interest is underscored by the specific granting of that right by municipal ordinance. The Respondent did not contend in either

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<sup>15</sup> App. F (26a).



the district court or Fifth Circuit that Petitioner's specific use permit was anything other than a significant property interest. The Fifth Circuit never reached the question of Petitioner's property right because it erroneously jumped onto the bandwagon of construing Petitioner's actions under the legislative model.

### **III. THE FIFTH CIRCUIT MISCONSTRUED THE ACTIONS OF THE CITY SECRETARY AND CLOAKED THEM WITH THE LEGISLATIVE MODEL SHIELD.**

The Fifth Circuit's analysis of the City Secretary's role is erroneous. In the decision, the only statements made by the Fifth Circuit concerning the actions of the City Secretary were:

County Line's alternative argument — that the action by the city secretary deprived it of procedural due process — lacks any merit. The city secretary possessed no power to make zoning decisions. Thus, her decision had no effect on the existence or non-existence of the SUP. Indeed, the city secretary's decision could very well have been wrong.

Fifth Circuit decision at 20a.

This analysis of the City Secretary's role in terminating Petitioner's specific use permit is in stark contrast to the uncontested summary judgment evidence presented by Petitioner based upon the testimony of Respondent's employees. In response to questions from counsel for Petitioner, the City Secretary gave the following deposition testimony:

Q: Did you reach the conclusion that the Specific Use Permit 212 had been terminated in accordance with Article 3745 [Section B-713] prior to your conversation with the City Attorney?

A: Yes.



Q: And was that the reason you denied Mr. Gomez' applications for an alcoholic beverage license?

A: Yes.<sup>16</sup>

Q: (By Mr. Bundren) Was there any reason for your denial of Mr. Gomez' application for an alcoholic beverage license, *other than your determination* that the SUP 212 had been terminated in accordance with Section A of Ordinance 3745 [Section B-713]?

A: I'm sorry, I didn't — I don't remember.

Mr. Bundren: Let him read it back.

(Reporter read back question.)

The Witness: No.<sup>17</sup>

Q: But you denied the licenses of Mr. Gomez because *you determinated* that the Specific Use Permit 212 had been terminated, is that correct?

A: Yes.

Q: And that was your reason for denying his application for licenses?

A: Yes.

Q: And that was the only reason you denied it?

A: Yes.<sup>18</sup>

This interpretation of the action of Sue Shawver was confirmed by Steven Stackhouse, the Zoning and Subdivision Administrator

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<sup>16</sup> Dep. Sue Shawver at 101.

<sup>17</sup> Dep. Sue Shawver at pp. 102-103 (emphasis added).

<sup>18</sup> Dep. Sue Shawver at 120 (emphasis added).

for the City of Grand Prairie, who, in response to questions by Petitioner's counsel gave the following deposition testimony:

Q: Do you know who was involved or who informed Mr. Gomez that this Specific Use Permit had terminated?

A: I believe that was determined when he had made application for either a continuance, extension or considered it a new application, if you will, of his alcoholic beverage commission's license to operate at that location. That is handled through the City Secretary's office. And it was, I'm sure, conveyed to Mr. Gomez at that time that, you know, that they *could not release such a license because his Specific Use Permit had ceased to exist.*<sup>19</sup>

The testimony of the City Secretary, and the confirmation of that testimony by Steven Stackhouse, the Zoning and Subdivision Administrator for Respondent, confirms that Petitioner's specific use permit was terminated or "ceased to exist." The Fifth Circuit nevertheless refused to consider the acts of the secretary because she may "have been wrong." The Fifth Circuit implies that Petitioner's specific use permit may not be terminated at this time; however, such implication is directly in conflict with the testimony of the City Secretary and the City's Zoning and Subdivision Administrator. The clear and convincing evidence is that Respondent treats Petitioner's specific use permit as having terminated or "ceased to exist." If the specific use permit has been terminated, as Respondent's witnesses unequivocally testify to, the termination undisputably occurred without notice or opportunity for a hearing to Petitioner. The Fifth Circuit refused to follow even Respondent's own evidence and, consequently, reached an erroneous conclusion.

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<sup>19</sup> Dep. Steven Stackhouse at pp. 80-81 (emphasis added).

#### IV. FUTURE SIGNIFICANCE OF THIS ISSUE.

The Fifth Circuit's opinion cloaks the City Secretary of Respondent with the deference normally afforded to legislative bodies when dealing with general laws affecting large numbers of individuals. In this case, the Fifth Circuit has, for the first time, given legislative deference to a decision of an employee reviewing and determining specific facts on a single application. The City Secretary's decision that Petitioner's specific use permit was terminated and, consequently, that Petitioner's tenant was not entitled to any license was not a legislative decision; it was, and is, clearly an adjudicative act. It reviewed a specific case, not a general application; it adjudged specific facts to a law (Ordinance 3745); it was not made by a legislative body, but by a single individual; and, it made a specific final ruling with respect to Petitioner's property. The practical and precedential effect of the Fifth Circuit ruling is to greatly expand those types of decisions that will be shielded by legislative deference. The precedent is dangerous to all citizens wishing to retain their property interest and significantly conflicts with prior procedural due process decisions of this Court and the other circuits.

If this decision of the Fifth Circuit is not reversed, the ability of owners to expect and receive, at the very minimum, notice and a hearing prior to the termination of their property rights will be seriously jeopardized. This decision has significance for all property owners who are presently having their property rights trampled upon by local municipalities without concern for procedural due process.

#### CONCLUSION

Petitioner has a significant property interest in its specific use permit giving rise to the procedural due process protection of notice and hearing. Respondent terminated Petitioner's specific use permit without notice and prior to any hearing. Petitioner

attempted to appeal the decision. Respondent's ordinances do not afford Petitioner a method to appeal the decision to terminate a specific use permit. Petitioner was entitled to notice and an opportunity to be heard prior to the termination of Petitioner's specific use permit. At the least, Petitioner was entitled to a reasonably timely post-deprivation hearing of the City Secretary's decision. Respondent violated Petitioner's procedural due process rights.

For all of these reasons, a writ of certiorari should be granted and this case should be set for argument.

Respectfully submitted,  
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By: /s/ WM. CHARLES BUNDREN  
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#### **CERTIFICATE OF SERVICE**

I hereby certify that three true and correct copies of the above and foregoing has been mailed, by Certified Mail, Return Receipt Requested, to counsel for Respondent, George A. Staples, Jr., Esq., Staples, Foster & Hampton, 701 Texas Commerce Bank Bldg., 860 Airport Freeway West, Hurst, Texas, 76054, on this 18th day of July, 1988.

/s/ WM. CHARLES BUNDREN  
 Wm. Charles Bundren

